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90 U.S. 242
Oct. 7. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 242.

F. W. HARTMAN, PLAINTIFF IN ERROR,

vs.

IRVING M. BEAN, COLLECTOR OF INTERNAL REVENUE, AND F. W. PAYNE, DEPUTY COLLECTOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 14, 1876.

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STATE OF WISCONSIN:

Circuit court, county of Milwaukee.

F. W. HARTMANN
against
IRVING M. BEAN & F. W. PAYNE.

STATE OF WISCONSIN,
County of Milwaukee, ss:

F. W. Hartmann, of the city of Milwaukee, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has a good and sufficient cause of action against Irving M. Bean and F. W. Payne, the defendants herein, arising upon the following facts, viz, that on the 22nd day of July, A. D. 1875, this deponent was entitled to the immediate possession of certain goods and chattels, the prop-
4 erty of this deponent, being 187 barrels of high wines, then at distillery warehouse No. 3, first district of Wisconsin, serial Nos. 1429 to 1494, 1549 to 1597, and 1627 to 1728, containing 14,465$\frac{11}{100}$ proof gallons, which were of the value of sixteen thousand nine hundred twenty-four $\frac{18}{100}$ dollars; that on the day aforesaid the above-named defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use, to the damage of this deponent of seventeen thousand dollars.

And deponent further says that upon the cause of action above stated he is about to commence an action against the said Irving M. Bean and F. W. Payne, and that a summons for that purpose, entitled as above, has this day been issued.

F. W. HARTMANN.

Sworn to and subscribed before me this 22nd day of July, A. D. 1875.
GEORGE SYLVESTER,
Notary Public Mil. Co., Wis.

5 Circuit court, Milwaukee County.

F. W. HARTMANN
against
IRVING M. BEAN & F. W. PAYNE.

To the sheriff of Milwaukee County:

You are required forthwith to arrest Irving M. Bean & F. W. Payne, the above-named defendants, and hold each of them to bail in the sum of seventeen thousand dollars, and to return this order to Cotzhausen, Sylvester, and Scheiber, the plaintiff's attorneys, at their office in the city of Milwaukee, within ten days after the arrest of the defendants.

Dated July 22, 1875.

EDWARD M. HUNTER,
Court Commissioner Milwaukee County.

COTZHAUSEN, SYLVESTER, & SCHEIBER,
Pl'ff's Att'ys.

Petition of def'ts for removal of suit to this court.

Circuit court of the United States, eastern district of Wisconsin.

To the honorable the circuit court of the United States, held in and for the eastern district of Wisconsin.

6 The petition of Irving M. Bean and F. W. Payne, both of the city and county of Milwaukee, within said district, respectfully shows that your petitioners were at the various times hereinafter named, and now are, officers of the United States, appointed under and acting by authority of the internal-revenue laws of the United States, embraced in Title thirty-five of the Revised Statutes of the United States, to wit, your petitioner, Irving M. Bean, was and is collector of internal revenue for the first collection district of the State of Wisconsin, and your petitioner, F. W. Payne, was and is deputy collector of internal revenue for the said first collection district of the State of Wisconsin.

That your petitioners were, on the 23d day of July, A. D. 1875, personally served with a summons for relief, affidavit, and order of arrest, issued out of the circuit court for Milwaukee County, and State of Wisconsin, wherein F. W. Hartmann is named as plaintiff, and your petitioners as defendants.

That said summons, affidavit, and order of arrest were served on your petitioners in the city of Milwaukee, and within said eastern district of Wisconsin; that by such service a suit and prosecution has been commenced against your petitioners in the said circuit

7 court of Milwaukee County, and that the nature of said suit and prosecution will and doth appear by a copy of said summons, affidavit, and order of arrest, hereto annexed and made a part of this petition, and which are the identical papers served upon your petitioner F. W. Payne as aforesaid, and the whole thereof, and that said suit and prosecution has not been tried.

That each and every of the acts done by your petitioners for or on account of which the said suit and prosecution was commenced was done under color of your petitioners' said offices of collector and deputy collector of internal revenue for the first collection district of Wisconsin, and under color of the said internal-revenue laws of the United States.

That this petition is made pursuant to the provisions of section 643 of the Revised Statutes of the United States.

Wherefore your petitioners pray that the said suit and prosecution may be removed into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute of the United States in such case made and provided, and that a writ of habeas corpus cum causa may be issued according to law.

8 And your petitioners will ever pray, &c.

Dated July 26, 1875.

IRVING M. BEAN.
F. W. PAYNE.

EASTERN DISTRICT OF WISCONSIN,
City and County of Milwaukee, ss:

Irving M. Bean and F. W. Payne, being each severally duly sworn, doth each for himself depose and say that he is one of the petitioners named in the foregoing petition, that he has read the same and knows the contents thereof, and that the same is true of his own knowledge.

IRVING M. BEAN.
F. W. PAYNE.

Subscribed and sworn to before me this 26th day of July, A. D. 1875.
EDWARD KURTZ, *Clerk.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

I, J. C. McKenney, do hereby certify that I reside in the town of Burke, in the western district of the State of Wisconsin; that I am an attorney and counsellor at law in the Supreme Court of the United States and in the circuit court of the United States for the eastern district of Wisconsin; that as counsel for the above-named
9 petitioners I have examined the proceedings against them, and have carefully inquired into all the matters set forth in the foregoing petition, and that I believe the same to be true.

Dated July 26, 1875.

J. C. MCKENNEY,
Counsel for Petitioners.

Whereupon a writ of habeas corpus cum causa issued in duplicate to said court, requiring said court to send to this court the record and proceedings in the above-entitled cause, with the bodies of said defendants, as follows:

Habeas corpus cum causa.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

The President of the United States of America, to the circuit
[SEAL.] court for the county of Milwaukee, in the State of Wisconsin, and to the sheriff of said county of Milwaukee, greeting:

Being informed by the petition of Irving M. Bean and F. W. Payne, duly verified by affidavit, together with the certificate of an attorney and counsellor at law of a court of record of the United States, thereto attached, as provided by law, that there is now pending in your
10 said circuit court for Milwaukee County a suit and prosecution in which F. W. Hartman is plaintiff, and Irving M. Bean and F. W. Payne are defendants, which suit was commenced on the 23rd day of July, A. D. 1875, against the said Irving M. Bean and F. W. Payne, for and on account of certain acts done by the said Irving M. Bean and F. W. Payne, as officers of the United States, appointed under and acting by authority of the internal-revenue laws of the United States, the said Irving M. Bean being collector of internal revenue for the first collection district of the State of Wisconsin, and the said F. W. Payne being deputy collector of internal revenue for the first collection district of the State of Wisconsin, and for and on account of certain acts done by said Irving M. Bean and F. W. Payne, under color of their said offices, and under color of the said internal-revenue laws of the United States; and that the said suit and prosecution was commenced by a form of proceeding by which a personal arrest of the said Irving M. Bean and F. W. Payne was ordered, and that said suit has not been tried.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, that you have the bodies of the said Irving M. Bean and F. W. Payne, under your custody de-
11 tained as it is said, by whatsoever names they may be charged, together with the day and cause of their being taken and detained, before the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the court-room in the United States custom-house, in the city of Milwaukee, in the eastern district of

Wisconsin, immediately after the receipt of this writ, then and there to do and receive whatsoever our said judge shall consider in that behalf, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said eastern district of Wisconsin, this twenty-seventh day of July, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundreth.

EDWARD KURTZ,
Clerk of the U. S. Circuit Court for the East'n Dist. of Wisconsin.

J. C. McKENNEY,
Attorney for Defendants.

Return.

Habeas corpus cum causa returned: Served this writ by delivering to P. Connolly, clerk of circuit court of Milwaukee Co., and
12 Charles Holzhauer, sheriff of said co., true copies of this writ of habeas corpus cum causa, this 24th day of July, 1875.

C. S. HAMILTON, *Marshal.*
By W. S. HAMILTON, *Deputy.*

Fees $4.50.

Return of Clerk of circuit court of Milwaukee Co. to writ of habeas corpus.

AUGUST 4, 1875.

Copy of record and proceedings in the circuit court for Milwaukee County, in this cause, duly certified by the clerk of said court as his return to the writ of habeas corpus cum causa, with duplicate of said writ annexed thereto, filed as follows:

THE STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

F. W. HARTMANN
vs.
IRVING M. BEAN & F. W. PAYNE.

To the above named defendants:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court, county of Milwaukee, at the city of Milwaukee, and to serve a copy of your answer to the said complaint on the subscribers at their office, cor. East Water & Wisconsin sts., in the city of Milwaukee, within twenty days after the service of this summons on you, exclusive
13 of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated July 22nd, 1875.

COTZHAUSEN, SYLVESTER & SCHEIBER,
Plaintiff's Attorneys.

MILWAUKEE COUNTY, *ss:*

I certify that on the 23d day of July, 1875, at the city of Milwaukee, in said county, I served the within summons on the within-named de-

fendants, Irving M. Bean and F. W. Payne, personally, by delivering a copy thereof to and leaving the same with each of them.

CHA'S HOLZHAUER,
Sheriff,
By W'M G. PARSONS,
Under Sheriff.

Fees, $2.30.

Circuit court, Milwaukee County.

F. W. HARTMANN, PLAINTIFF,
against
IRVING M. BEAN & F. W. PAYNE, DEFENDANTS.

Whereas the above-named defendant, Irving M. Bean, has been arrested by the sheriff of Milwaukee County, and is now in his custody, under and pursuant to an order of arrest made by Hon. Edward
14 M. Hunter, a court commissioner of said county, requiring the said defendant to be arrested and held to bail by the said sheriff in the sum of seventeen thousand dollars:

Now, therefore, we, Ephraim Mariner, by occupation lawyer, and residing in the city of Milwaukee; Edward Ferguson, U. S. pension agent by occupation, and residing in said city of Milwaukee; and Charles C. Paine, by occupation deputy collector of customs, residing in said city of Milwaukee, do hereby undertake, in the sum of seventeen thousand dollars, that the said defendant, Irving M. Bean, shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein.

Dated Milwaukee, this 23rd day of July, A. D. 1875.

E. MARINER. [SEAL.]
E. FERGUSON. [SEAL.]
C. C. PAINE. [SEAL.]

MILWAUKEE COUNTY, *ss:*

I hereby certify that the within is a true copy of the original undertaking of the bail taken by me from the defendant, Irving M. Bean.

Dated July 23, 1875.

CHA'S HOLZHAUER,
Sheriff,
By W'M G. PARSONS,
Under Sh'ff.

15 Circuit court, Milwaukee County.

F. W. HARTMANN, PLAINTIFF,
against
IRVING M. BEAN AND F. W. PAYNE, DEFENDANTS.

Whereas the above-named defendant, F. W. Payne, has been arrested by the sheriff of Milwaukee County, and is now in his custody, under and pursuant to an order of arrest made by the Hon. Edward M. Hunter, a court commissioner of said county, requiring the said defendant to be arrested and held to bail by the said sheriff in the sum of seventeen thousand dollars:

Now, therefore, we, Thomas Shea, by occupation transferring freight, and residing in the city of Milwaukee, and Henry C. Payne, by occupation insurance agent, and residing in the city of Milwaukee, do hereby undertake, in the sum of seventeen thousand dollars, that the said defendant, F. W. Payne, shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein.

Dated Milwaukee, this 23rd day of July, A. D. 1875.

THOMAS SHEA. [SEAL.]
HENRY C. PAYNE. [SEAL.]

16 MILWAUKEE COUNTY, *ss:*

I certify that the within is a true copy of the original undertaking of the bail taken by me from the defendant, F. W. Payne.

Dated July 23, 1875.

CHA'S HOLZHAUER,
Sheriff,
By W'M G. PARSONS,
Under Sh'ff.

STATE OF WISCONSIN:

Circuit court, county of Milwaukee.

F. W. HARTMANN
against
IRVING M. BEAN & F. W. PAYNE.

STATE OF WISCONSIN,
County of Milwaukee, ss:

F. W. Hartmann, of the city of Milwaukee, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has a good and sufficient cause of action against Irving M. Bean and F. W. Payne, the defendants herein, arising upon the following facts, viz: That on the 22nd day of July, A. D. 1875, this deponent was entitled to the immediate possession of certain goods and chattels, the property of this deponent, being 187 barrels of high wines, then at distillery
17 warehouse No. 3, first district of Wisconsin, serial Nos. 1429 to 1494, 1579 to 1597, and 1627 to 1728, containing 14,465 $\frac{115}{100}$ proof-gallons, which were of the value of sixteen thousand nine hundred twenty-four $\frac{18}{100}$ dollars; that on the day aforesaid the above-named defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use, to the damage of this deponent of seventeen thousand dollars.

And deponent further says that upon the cause of action above stated he is about to commence an action against the said Irving M. Bean and F. W. Payne, and that a summons for that purpose, entitled as above, has this day been issued.

F. W. HARTMANN.

Sworn to and subscribed before me this 22nd day of July, A. D. 1875.

GEORGE SYLVESTER,
Notary Public Mil. Co., Wis.

Circuit court, Milwaukee County.

F. W. HARTMANN
ag'st
IRVING M. BEAN & F. W. PAYNE.

To the sheriff of Milwaukee County:

18 You are required forthwith to arrest Irving M. Bean and F. W. Payne, the above-named defendants, and hold each of them to bail in the sum of seventeen thousand dollars, and to return this order to Cotzhausen, Sylvester & Scheiber, the plaintiff's attorneys, at their office in the city of Milwaukee, within ten days after the arrest of the defendants.

Dated July 22, 1875.

EDWARD M. HUNTER,
Court Commissioner, Milwaukee County.

COTZHAUSEN, SYLVESTER & SCHEIBER,
Pl'ff's Att'ys.

MILWAUKEE COUNTY, *ss:*

I certify that on the 23d day of July, 1875, I arrested both of the within-named defendants, Irving M. Bean and F. W. Payne, pursuant to the within order, and at the same time I served upon and personally delivered to each of them a copy of said order, and of the affidavit thereto annexed upon which said order was granted, and I have taken from said defendant, Irving M. Bean, the undertaking of E. Mariner, E. Ferguson, and Cha's C. Paine, and from said defendant, F. W. Payne, the undertaking of Thomas Shea and Henry C. Payne, copies of which undertakings, duly certified by me, are herewith returned.

CHA'S HOLZHAUER,
Sheriff,
By W'M G. PARSONS,
Under Sheriff.

Fee, $10.50.

19 Circuit court, Milwaukee County.

F. W. HARTMANN
ag'st
IRVING M. BEAN & F. W. PAYNE.

Whereas the plaintiff in the above-entitled action is about to make application for an order to arrest the defendants therein:

Now, therefore, I, F. W. Hartmann, of the city of Milwaukee, in said county, do hereby undertake, pursuant to the statute in such case made and provided, that if said defendants, or either of them, recover a judgment herein, the plaintiff will pay all costs which may be awarded to the defendants, or either of them, and all damages which they, or either of them, may sustain by reason of the arrest, not exceeding the sum of two hundred dollars.

F. W. HARTMANN.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 22nd day of July, 1875, personally came before me F. W. Hartmann, to me known to be the individual who executed the foregoing undertaking, and acknowledged that he executed the same.

GEORGE SYLVESTER,
Notary Public Mil. Co., Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

F. W. Hartmann, subscriber to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities, in property not by law exempt from seizure or sale on attachment or execution.

F. W. HARTMANN.

Subscribed and sworn to before me this 22nd day of July, 1875.
GEO. SYLVESTER,
Notary Public Mil. Co., Wis.

(Duplicate.)

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

The President of the United States of America to the circuit court for the county of Milwaukee, in the State of Wisconsin, and to [SEAL.] the sheriff of said county of Milwaukee, greeting:

Being informed by the petition of Irving M. Bean and F. W. Payne, duly verified by affidavit, together with the certificate of an attor-
21 ney and counsellor at law of a court of record of the United States thereto attached, as provided by law, that there is now pending in your said circuit court for Milwaukee County a suit and prosecution, in which F. W. Hartmann is plaintiff and Irving M. Bean and F. W. Payne are defendants, which suit was commenced on the 23rd day of July, A. D. 1875, against the said Irving M. Bean and F. W. Payne, for and on account of certain acts done by the said Irving M. Bean and F. W. Payne, as officers of the United States, appointed under and acting by authority of the internal-revenue laws of the United States, the said Irving M. Bean being collector of internal revenue for the first collection district of the State of Wisconsin, and the said F. W. Payne being deputy collector of internal revenue for the first collection district of the State of Wisconsin, and for and on account of certain acts done by said Irving M. Bean and F. W. Payne, under color of their said offices and under color of the said internal-revenue laws of the United States; and that the said suit and prosecution was commenced by a form of proceeding by which a personal arrest of the said Irving M. Bean and F. W. Payne was ordered, and that said suit has not been tried:

Now, therefore, you are hereby commanded, in the name of the
22 President of the United States of America, that you have the bodies of the said Irving M. Bean and F. W. Payne, under your custody detained as it is said, by whatsoever name they may be charged, together with the day and cause of their being taken and detained, before the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the court-room in the United States custom-house in the city of Milwaukee, in the eastern district of Wisconsin, immediately after the receipt of this writ, then and there to do and receive whatsoever our said judge shall consider in that behalf; and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said eastern district of Wisconsin, this twenty-seventh day of July, in the

year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the East'n District of Wisconsin.

J. C. McKENNEY,
Attorney for Defendants.

23 Circuit court Milwaukee County, June term, 1875.

Cotzhausen, S., & Scheiber.

F. W. HARTMANN
against
IRVING M. BEAN & F. W. PAYNE.

JULY 28TH, 1875.

And now comes the plaintiff in the above-entitled action, by Cotzhausen, Sylvester & Scheiber, his attorneys, and files his summons, with certificate of service endorsed thereon, as follows:

MILWAUKEE COUNTY, *ss:*

I certify that on the 23d day of July, 1875, at the city of Milwaukee, in said county, I served the within summons on the within-named defendants, Irving M. Bean and F. W. Payne, personally, by delivering a copy thereof to and leaving the same with each of them.

CHA'S HOLZHAUER,
Sheriff,
By WM G. PARSONS,
Under Sheriff.

Fees, $2.30.

Same time affidavit and order of arrest filed, as follows:

To the sheriff of Milwaukee County:

You are required forthwith to arrest Irving M. Bean and F. W. Payne, the above-named defendants, and hold each of them to bail in the sum of seventeen thousand dollars, and to return this order to Cotzhausen, Sylvester & Scheiber, the plaintiff's attorneys, at their office in
24 the city of Milwaukee, within ten days after the arrest of the defendants.

Dated July 22, 1875.

EDWARD M. HUNTER,
Court Commissioner, Milwaukee County.

COTZHAUSEN, SYLVESTER & SCHEIBER,
Plaintiff's Att'ys.

Same time endorsed as follows:

MILWAUKEE COUNTY, *ss:*

I certify that on the 23d day of July, 1875, I arrested both of the within-named defendants, Irving M. Bean and F. W. Payne, pursuant to the within order, and at the same time I served and personally delivered to each of them a copy of said order, and of the affidavit hereto annexed upon which said order was granted, and I have taken from said defendants Irving M. Bean the undertaking of E. Mariner, E. Ferguson, and

Cha's C. Paine, and from said defendant F. W. Payne, the undertaking of Thomas Shea and Henry C. Payne, copies of which undertakings duly certified by me are herewith returned.

CHA'S HOLZHAUER,
Sheriff,
By WM G. PARSONS,
Under Sheriff.

Fees $10.50.

Same time undertaking filed.

JULY 27, 1875.—Duplicate copy habeas corpus cum causa filed.

25 STATE OF WISCONSIN,
Circuit Court Milwaukee County, ss:

I, Patrick Connolly, j'r, clerk of said court, do hereby certify that I have compared the foregoing copy with the original docket entries in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office; and that the papers hereunto annexed are the originals and all of the papers filed in said action.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 4th day of August, A. D. 1875.

[SEAL.] PATRICK CONNOLLY, J'R, *Clerk.*

AUGUST 28, 1875.

This day came the plaintiff, by his attorneys, Mess'rs Cotzhausen, Sylvester & Scheiber, and filed his complaint, as follows:

Complaint.

United States circuit court, eastern district of Wisconsin.

F. W. HARTMANN, PL'FF,
vs.
IRVING M. BEAN & F. W. PAYNE, DEF'TS.

26 The complaint of the above-named plaintiff respectfully shows to this court:

That on the 22nd day of July, 1865, this plaintiff was the owner, and entitled to the immediate possession of the following described goods, wares, and merchandise, to wit: One hundred and eighty-seven (187) barrels of distilled spirits, commonly known as "high wines," then being at distillery warehouse No. 3, in the first collection district of Wisconsin, serial numbers 1429 to 1494, 1579 to 1597, and 1627 to 1728, containing in the aggregate fourteen thousand four hundred and sixty-five & $\frac{11\frac{5}{8}}{100}$ proof gallons, and which were of the value of sixteen thousand nine hundred and twenty-four & $\frac{18}{100}$ dollars.

That on the day aforesaid the above-named defendants then being in the possession of said goods, unlawfully converted and disposed of the same to their own use, to the damage of this plaintiff in the sum of seventeen thousand dollars.

Wherefore the plaintiff demands judgment against said defendants for the sum of seventeen thousand dollars, besides costs.

COTZHAUSEN, SYLVESTER & SCHEIBER,
Pl'ff's Att'ys.

EASTERN DISTRICT OF WISCONSIN, *ss:*

F. W. Hartmann, of Milwaukee, in said district, being first
27 duly sworn, says that he is the plaintiff in the above action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge.

F. W. HARTMANN.

Subscribed and sworn to before me this 28th day of August, 1875.

GEORGE SYLVESTER,
Notary Public Mil. Co., Wis.

SEPTEMBER 25, 1875.

This day came the defendants, by their attorney, M'r J. C. McKenney, and filed their answer, as follows:

Answer.

Circuit court of the United States, eastern district of Wisconsin.

F. W. HARTMANN, PLAINTIFF,
vs.
IRVING M. BEAN AND F. W. PAYNE, DEFENDANTS.

The defendants above named, for answer to the plaintiff's complaint, allege and say:

That during the months of January, February, & March, 1875, one Robert Kiewert was a distiller, and did carry on the business of
28 a distiller under the firm name and style of the Menomonee Distilling Company, at the city of Milwaukee, in said eastern district of Wisconsin, and that afterwards, on the 10th day of June, A. D. 1875, the Commissioner of Internal Revenue of the United States did duly assess upon and against the said Robert Kiewert, then and there being such distiller as aforesaid, and upon and against the said Menomonee Distilling Company, the sum of two thousand eight hundred and fifty-seven & $\frac{68}{100}$ ($2,857.68) dollars, as tax upon four thousand and eighty-two & $\frac{38}{100}$ proof gallons of distilled spirits, distilled and owned by the said Robert Kiewert, and at said distillery of the Menomonee Distilling Company, between the 6th day of January, A. D. 1875, and the 8th day of March, A. D. 1875, under and by virtue of the provisions of the laws of the United States in such case made and provided, and by virtue of the 3253d and 3309th sections of the Revised Statutes of the United States; and that thereafter, on the 15th day of June, A. D. 1875, George Q. Erskine, then and there collector of internal revenue for the first collection district of the State of Wisconsin, did give due notice to said Robert Kiewert, being the person liable to pay said tax, by sending to him by mail a notice in writing, stating in and by said notice the
29 amount of such tax, and demanding payment thereof, and that said Robert Kiewert wholly neglected and refused to pay the same; that afterwards, on the 3rd day of July, A. D. 1875, the defendant, Irving M. Bean, then and there being collector of internal revenue for the first collection district of the State of Wisconsin, did duly issue his warrant in pursuance of the statute in such case made and provided, duly authorizing the defendant, F. W. Payne, then and there being deputy collector of internal revenue for the collection district aforesaid, to collect said tax, and to levy upon the property and rights to property belonging to said Robert Kiewert, and on which a lien existed for the

payment of said tax, with interest and penalty as provided by law; that afterwards, on the 8th day of July, A. D. 1875, the said defendant, F. W. Payne, as deputy collector aforesaid, proceeded to take the means required by law to collect said tax and assessment, and proceeded to levy and collect said tax by distress and sale of the property of the said Robert Kiewert, and on which lien existed, according to the commands of such warrant, and according to the provisions of the statute in such case made and provided, and did then and there levy and distrain upon the said one hundred and eighty seven barrels of high wines men-
30 tioned in said complaint, situate at said distillery of the Menomonee Distilling Company, in said city of Milwaukee, and then and there the property of the said Robert Kiewert, and then and there, and from the 10th day of June, A. D. 1875, situate and being on the distillery premises of the said Menomone Distilling Company; and afterwards the said F. W. Payne, as deputy collector as aforesaid, did make and cause to be made an account of the goods and effects distrained and levied upon, and sign a copy of the same, and serve the same pursuant to law; and afterwards, after due notice as provided by law, said F. W. Payne, as deputy collector as aforesaid, sold the said property so levied and destrained upon as aforesaid, for the purpose of collecting the said tax so assessed as aforesaid, with interest and penalty for non-payment & the fees, costs, and expenses of such levy, to the highest bidder, for the sum of fourteen hundred forty-eight and forty-one hundredths dollars, that being the highest sum bidden for the same; that thereupon the defendant, F. W. Payne, made due return of his doings on said warrant, and made due account of the proceeds of said sale, and applied the same to the payment of said tax and assessment, as provided by law.

And these defendants deny, upon information and belief, that
31 the said plaintiff was on the 22nd day of July, A. D. 1875, the owner, or entitled to the immediate possession of said property, or at any time; and they say that said property was not worth to exceed the sum for which the same was sold as aforesaid.

And the said defendants allege that the said levy and sale are the same taking, trespass, and conversion alleged in said complaint, and they deny any wrong, or injury, or damage done to said plaintiff, and each and every allegation of said complaint inconsistent with the facts herein set forth.

J. C. McKENNEY,
Defendants' Attorney.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

Irving M. Bean and F. W. Payne, being severally duly sworn, doth each for himself depose and say that he is the defendant above named, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

IRVING M. BEAN.
F. W. PAYNE.

Subscribed and sworn to before me this 24th day of September, A. D. 1875.

EDW. KURTZ, *Clerk.*

32 And now, at this same term, to wit, January term, A. D. 1876,

and on the eighty-third day thereof, to wit, on the 19th day of April, A. D. 1876, the following proceedings were had, to wit:

Trial.

F. W. HARTMANN
vs.
IRVING M. BEAN & F. W. PAYNE. } At law.

This day came the parties, by their counsel, M'r Cotzhausen, appearing for the plaintiff, and Mess'rs T. L. Dixon and J. C. McKenney, special assistant U. S. attorneys, for the defendants, and the issue herein came on to be tried, when the parties entered into a written stipulation as herein filed, to wit:

It is hereby stipulated and agreed between the parties to the above-entitled action that the same shall be, and hereby is, submitted to and tried by the court without the intervention of a jury.

Milwaukee, April 19, 1876.

(Signed) COTZHAUSEN, SYLVESTER & S.,
Pl'ff's Att'ys.
J. C. McKENNEY, *Att'y for Def'ts.*

Whereupon the trial of the said issue was commenced by the court, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the eighty-fourth day of said term, to wit, on the 20th day of April, A. D. 1876, the following proceedings were had, to wit:

33 *Finding for def'ts and judgment.*

F. W. HARTMANN
vs.
IRVING M. BEAN & F. W. PAYNE. } At law.

This day came the parties, by their counsel, and the trial of the issue herein was resumed by the court, and being argued by said counsel and submitted, on consideration of the pleadings and the evidence and the said arguments of counsel thereon, the court doth find the issue herein in favor of the defendants, and that the defendants are not guilty in manner and form as the plaintiff hath herein alleged against them.

Whereupon it is considered and adjudged by this court, now here, that the plaintiff take nothing by his suit, and that the defendants do have and recover of the said plaintiff, F. W. Hartmann, twenty-eight dollars and thirty cents, their costs about their said defense in this behalf by them expended, and that they have execution therefor.

Judgment roll signed April 20th, A. D. 1876.

EDWARD KURTZ, *Clerk.*

Costs $28.30.

APRIL 20, 1876.

Bill of exceptions signed and filed, as follows:

34 *Bill of exceptions.*

United States circuit court, eastern district of Wisconsin.

F. W. HAETMANN
against
IRVING M. BEAN ET AL.

APRIL, 1876.

Be it remembered that this case, by stipulation in writing between the parties, was submitted to the court upon the law and facts, without the intervention of a jury, and upon the trial the following facts appeared in evidence:

The plaintiff is and for a number of years last past has been a rectifier and wholesale dealer in wines and liquors, doing business in Milwaukee. In carrying on said business he has frequently bought high wines in smaller and larger quantities while still subject to tax and in bonded warehouses, as is the universal custom with dealers, withdrawing the same from time to time on payment of tax as fast as wanted.

On the 8th day of May, 1875, he bought in good faith and in the ordinary course of business from one Robert Kiewert, then and there a distiller, carrying on business under the firm-name of the "Menomonee Distilling Company," at Milwaukee, the high wines mentioned in
35 the complaint, then at distillery warehouse No. 3, first dis't of Wisconsin, which said high wines had been produced at said distillery and from thence removed to said bonded warehouse, and on which the taxes had not been paid, paying therefor $3,760\frac{82}{100}$, being 26 cents per proof gallon subject to tax. On the same day he caused notice in writing of said sale and purchase to be given to the collector at Milwaukee, which notice ever since has been and now is on file in said office.

Not being in pressing need of the high wines so bought, the plaintiff allowed them to remain in said bonded warehouse the said warehouse constituting a part of the distillery premises where said high wines were manufactured, without making any application or effort to remove or withdraw them, until the 14th day of June, 1875, when he caused the proper statements and certificates required by law to be made out, and the tax on said high wines to be duly tendered to the collector, but leave to withdraw them was then and there refused, because, pursuant to the provisions of sec. 3309 of the Rev. Statutes, on the 10th day of June, 1875, the Commissioner of Internal Revenue of the United States assessed upon and against the aforesaid Robert Kiewert and the said Menomonee Distilling Company the sum of $\$2,857\frac{68}{100}$ dollars as tax upon $4,082\frac{38}{100}$
36 proof gallons of distilled spirits distilled by the said Robert Kiewert at said distillery between the 6th day of January, 1875, and the 8th day of March, 1875; that thereafter, on the 15th day of June, 1875, George Q. Erskine, then and there collector of internal revenue for the first collection district of the State of Wisconsin, did give notice to said Robert Kiewert, being the person liable to pay said tax, by sending to him by mail a notice in writing stating in and by said notice the amount of such tax, and demanding payment thereof, and that said Rober Kiewert wholly neglected and refused to pay the same; that afterwards, on the 3rd day of July, A. D. 1875, the defendant, Irving M.

Bean, then and there being collector of internal revenue for the first collection district of the State of Wisconsin, did issue his warrant in pursuance of the statute in such case made and provided, authorizing the defendant, F. W. Payne, then and there being deputy collector of internal revenue for the collection district aforesaid, to collect said tax, and to levy upon the property and rights to property belonging to said Robert Kiewert, and on which a lien existed, for the payment of said tax, with interest and penalty as provided by law.

That afterwards, on the 8th day of July, A. D. 1875, the said de-
37 fendant, F. W. Payne, as deputy collector aforesaid, proceeded to levy and collect said tax by distress and sale, and did then and there levy and distrain, by the order and directions of the defendant, Irving M. Bean, upon the said one hundred and eighty-seven barrels of high wines mentioned in said complaint, then being in the bonded warehouse of the Menomonee Distilling Company as aforesaid, and advertised the same for sale.

That while holding possession of said high wines, by virtue of said warrant and levy as aforesaid, on the day preceding the sale, to wit, the 22nd day of July, 1875, the plaintiff tendered to the collector the amount of the tax due and owing on said high wines, at the rate of ninety cents per proof-gallon, and demanded possession thereof from said defendants, and that said levy be released and the sale so advertised be discontinued and abandoned, but the defendants then and there refused to release said property, and the same, on the 23rd day of July, 1875, by virtue of said warrant and distraint, was sold by them for the purpose of collecting the said tax so assessed as aforesaid, with interest and penalty, and the fees, costs, and expenses of such levy, to the highest bidder, and the proceeds of said sale were applied by them to the payment of said tax and assessment, interest, penalty, and fees as aforesaid. The market price of high wines in bonded warehouse at
38 the time of such demand, refusal, and sale was 27 cents per proof-gallon, and the aggregate value of the property described in the complaint was sixteen thousand nine hundred twenty-four & $\frac{18}{100}$ dollars, inclusive of the tax.

And thereupon the court was of opinion that in point of law there was a lien on the said high wines for the assessment so made by the Commissioner, and that this action could not be maintained, and that the assessment and sale under the warrant of distress as aforesaid were valid.

To which opinion of the court the plaintiff then and there excepted.

THOMAS DRUMMOND,
U. S. Circ't Judge.

Bond for costs on writ of error.

JULY 31, 1876.

This day came the plaintiff and filed his bond in the sum of two hundred and fifty dollars, with F. W. Cotzhausen and E. P. Smith as securities, conditioned that he shall prosecute a writ of error to effect and answer all damages and costs if he failed to make his plea good, which bond is approved by the district judge, and is as follows:

Know all men by these presents that we, F. W. Hartmann as principal, and F. W. Cotzhausen and E. P. Smith as securities, all
39 of the city of Milwaukee, are held and firmly bound unto Irving M. Bean and F. W. Payne in the full and just sum

of two hundred and fifty dollars, to be paid to the said Irving M. Bean and F. W. Payne, or their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 26th day of July, A. D. 1876.

Whereas lately at a term of the circuit court of the United States in and for the eastern district of Wisconsin, in a suit depending in said court between the above-named F. W. Hartmann, plaintiff, and said Irving M. Bean and F. W. Payne, as defendants, a judgment was rendered that said plaintiff recover nothing by his suit, and that the defendant do have and recover of the plaintiff $28\frac{30}{100}$ dollars, costs of suit; and the said F. W. Hartmann having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Irving M. Bean and F. W. Payne citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said F. W. Hartmann shall prosecute said writ of error to effect and
40 answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

F. W. HARTMANN. [L. S.]
F. W. COTZHAUSEN. [L. S.]
E. P. SMITH. [L. S.]

Sealed and delivered in presence of—
FRANK M. HOYT.
GEO. PROTZMANN.

(Endorsed:) Approved. Cha's E. Dyer, dist. judge. July 31, 1876.

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendant in error.

41 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of F. W. Hartman vs. Irving M. Bean and F. W. Payne.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ, *Clerk.*

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between F. W. Hartman, plaintiff, and Irving M. Bean and F. W. Payne, defendants, a manifest error hath happened, to the great damage of the said plaintiff, F. W. Hartman, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 31st day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court for East'n Dist. of Wisconsin.

(Indorsed:) Filed July 31, 1876. Edw. Kurtz, clerk U. S. cir. court for E. dist. of Wis.

43 THE UNITED STATES OF AMERICA, *ss:*

To Irving M. Bean and F. W. Payne, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein F. W. Hartman is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 101st.

[SEAL.] CHA'S E. DYER,
U. S. Dist. Judge.

I accept service of the above citation this 3rd day of August, A. D. 1867.

IRVING M. BEAN.

(Indorsement on cover:) No. 242. F. W. Hartman, plaintiff in error, vs. Irving M. Bean, collector of internal revenue, & F. W. Payne, dep'y coll'r. E. Wisconsin C. C. U. S. Filed 14 October, 1875.

Supreme Court of the United States.

No. 242.

F. W. HARTMANN, PLAINTIFF IN ERROR,

vs.

IRVING M. BEAN, COLLECTOR OF INTERNAL REVENUE,

AND

F. W. PAYNE, DEPUTY COLLECTOR.

In Error to the Circuit Court of the United States, for the Eastern District of Wisconsin.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

Supreme Court of the United States.

No. 242.

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IRVING M. BEAN, COLLECTOR OF INTERNAL REVENUE,

AND

F. W. PAYNE, DEPUTY COLLECTOR.

In Error to the Circuit Court of the United States, for the Eastern District of Wisconsin.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

(References are to marginal page.)

I.

STATEMENT OF CASE.

The plaintiff in error was plaintiff below. He brought this suit to recover damages for the conversion of certain highwines, belonging to him, which were seized and sold by said defendants, on warrant of distraint, running against one Robert Kiewert, a distiller at the city of Milwaukee.

The complaint is in ordinary form in Trover [26.]

The defendants justify under an assessment and warrant of distraint against the aforesaid distiller, alleging that said pro-

perty belonged to the latter and was subject to a lien, existing in favor of the U. S. Government by virtue of the Internal Revenue act [28-31.]

A jury trial was waived. The case was tried before the court and resulted in a finding and judgment for the defendants [33.]

The bill of exceptions fully presents the leading facts [34-38.]

Robert Kiewert in the year 1875 was a distiller at Milwaukee, carrying on business under the firm name of the "Menomonee Distilling Company." On the 8th day of May, 1875, he had in store at his bonded warehouse a lot of highwines, by him distilled, of the value of 26-27 cents per proof gallon, exclusive of tax [35.]

The plaintiff in error, who is a rectifier and wholesale dealer at Milwaukee, on the day aforesaid, for $3,760.82, then and there paid, bought these spirits from said distiller, in bond, subject to tax as aforesaid [35.]

The purchase was *in perfect good faith* and in the *ordinary course of business.* Sales of this kind, in bond—subject to tax, are found by the court to be in conformity to a *universal custom* [35]; the spirits may be withdrawn on application at any time, within one year from date of entry and giving of bond, on payment of the tax thereon. [Sec. 3293.] Upon making such purchase, notice thereof *in writing* was immediately given to the collector of the district [35]

Not being in need of the highwines so bought, the plaintiff did not make application for their withdrawal from the warehouse until June 14, 1875, when he caused proper demand therefor to be made and the tax thereon to be duly tendered [35.]

The collector however, refused to deliver, on the ground that a few days theretofore, to wit: on the 10th day of June, the Commissioner of Internal Revenue had made an *assessment* against the former owner [35.]

The precise nature of this assessment does not appear: Whether it is for a capacity or deficiency tax is not disclosed.

It merely appears that it was made under sec. 3309 R. S., on account of certain spirits said to have been distilled several months theretofore, to wit.: between January 6 and March 8, 1875, [35.]

The record further shows that this assessment was followed up by the customary notice and demand of payment on June 15th, by a warrant of distraint on July 3, by a levy and distress on July 8, and finally by a sale of these highwines on July 23, 1875. The proceeds were applied on the warrant.

A second tender and demand on the part of the plaintiff in error was made on the day preceding the sale, but to no better effect than before [37.] The time of conversion is laid in the complaint as of this day, July 22, 1875.

All these facts stand undisputed.—The court below was of opinion that the assessment, made by the commissioner, constituted *a lien* on these highwines, which could be enforced by distraint and that consequently said assessment and subsequent proceedings constituted a complete defense. [38.] It filed its finding and ordered judgment accordingly.

II.

Assignment of Errors.

The above ruling (the court's conclusion of law upon the facts stated) is the only error assigned. We contend that these highwines were neither subject to *lien* nor *seizure* on account of such assessment and that consequently their withholding and sale constituted a conversion.

III.

Points and Argument.

a. The plaintiff's right of recovery is complete, unless the assessment and distraint prove to be a justification.

We hardly need to discuss this proposition. Its correctness was conceded on the trial below by court and counsel.

The highwines belonged to the plaintiff and he was entitled to their possession, unless this assessment and distraint justified their withholding. No one pretends that they were *illicit goods*, or that they had become *forfeited* prior to the sale to Hartmann—*so that title could not be passed.* For all that appears they were spirits duly manufactured, duly stored and duly bonded, in no way or manner tainted by unlawful practices or unlawful designs.

At the time of this sale to Hartmann (May 8th) the *distiller* OWNED them, free and clear of all liens, except the tax agreed to be paid according to warehouse bond. Consequently he could lawfully sell and *vest title in the purchaser.*

This is not like the case of Henderson vs. United States, 14 Wal., 44; and we are aware of no law or decision at variance with our position.

The court below found that the transfer and purchase was fairly and openly conducted *in good faith, for a valuable consideration, in the ordinary course of business, in conformity with a custom, universal among dealers;* also, that notice of such sale was immediately given in writing to the collector of the district and remained on file in his office.

Nothing more could well be done, to make this change of ownership complete, effectual and public.

b. The distiller having no further right, title or interest in these goods, they could not be distrained as property belonging to him.

The law relating to distraint, we find at Sec. 3184—3195. The statute in the plainest possible language reiterates, what in the nature of things would seem to follow: It is the *person, liable to pay the* tax or assessment, and *delinquent* in the payment thereof, against whose "*property and rights to property,*" the warrant issues. Sec. 3187-3188-3194.

c. But (say the court below) **a warrant of distraint may be levied not only on property, at the time of seizure belonging to the distiller, but on all other property, on which a lien exists,**

And, to justify his finding, the learned Circuit Judge reasoned substantially as follows: "Sec. 3309 makes the assessment a lien "on all distilled spirits on the distillery premises;—a bonded "warehouse is part and parcel of the distillery premises;—these "highwines were in the warehouse, when the assessment was "made—*ergo*: They were subject to a lien."

"Sec. 3188 provides for enforcing a lien. In case of neglect "or refusal to pay, the collector may levy upon all property and "rights to property, belonging to such delinquent person, or on "which *the said lien* exists, &c. Consequently (the court conclude,) "the remedy by distraint in the case at bar was clearly proper."

Little argument will, however, suffice to show the fallacy of this mode of reasoning:

1st. The lien, spoken of in Sec. 3188, to be enforced by distraint, is widely different from that given by Sec. 3309.

Sec. 3188 does not include liens generally, but distinctly speaks of "*the said lien*," meaning the lien given by the *immediately preceding sections*, particularly Sec. 3186.

It is the lien of certain taxes, *adjudged by the commissioner to be owing* to the Government, with interest, penalties and costs, which a party neglects or refuses to pay *after demand* is made, as provided in Sec. 3184.

Such lien does not attach until the assessment has become due, and it affects no property, or rights to property, *but such as belong to the delinquent at the time* [Sec. 3186.]

This remedy by distraint (summary as it is, preceded by no trial, based upon *exparte* investigation merely), evidently was not intended to be broadly applied to all cases of liens, but to be confined to the liens specially mentioned, and to property, owned by the delinquent at the time, when so in default.

A warrant of distraint may not issue for some time after an assessment has been made and become due. There is good reason

for saying to parties, dealing with a distiller, that they purchase at their peril, after an assessment has been actually made; and when speaking of property and rights of property, belonging to said delinquent *or on which the said lien exists*, Congress no doubt intends to guard against a transfer of property, *after an assessment has been made and a lien has accrued* and before the distraint is actually levied. Property, so transferred, may well be held to be subject to seizure. But beyond this, reason will not permit us to give effect to the general language of Sec. 3188, and courts ought to be loath in extending by judicial construction the application of this summary remedy, so as to operate unjustly upon parties, who have bought in good faith, while no lien existed—while no assessment was as yet made.

We therefore claim that the remedy by distraint is not at all applicable to the case at bar.

2nd. It may well be doubted whether distilled spirits, *stored in a Government warehouse, duly entered and bonded*, can be said to be *on the distillery premises*, within the meaning of Sec. 3309.

It is true that in the first instance the duty devolves upon the distiller to provide a suitable locality for warehouse purposes; but having done so, the same is placed under charge of a government storekeeper. The spirits are held "*in custodia regis.*"

In U. S. vs. Seymour McCullough 3 Int. Rev. Rec. 10. Blatchford, J. held, that by a transfer of the goods in bond, the bonded warehouse became the premises of the vendee, instead of the vendor.

3rd. Having required and accepted a bond "from the *distiller* or *owner*, conditioned that the *principal* named in the bond shall pay the tax, *or cause the same to be paid*, before removal from said bonded warehouse and within one year from the date of said bond "(Sec. 3293)", and having pro-

vided in express terms "that any distilled spirits may, *on payment of the tax thereon*, be withdrawn etc. (Sec. 3294), the Government ought to be estopped from asserting rights or imposing conditions, at variance with the bond, and making its performance altogether impossible.

If we be correct in this proposition, the court certainly ought not to labor for the purpose of giving to the general language of Sec. 3309 a construction, which would do violence to this equitable principle.

4th. The general language, used in Sec. 3309, was never intended to create a lien on property, *in which the delinquent has no interest at the time, when the assessment is made*—although the same may be found on the distillery premises.

This is not a case, where the Government asserts a *specific* lien for taxes, due and owing, *on the spirits themselves.*

Nor a question of forfeiture, where the rights of the Government must prevail over any title, however honestly acquired, *subsequent to the unlawful acts, creating the forfeiture.*

The Government in the case at bar seeks to enforce an assessment, made by the commissioner, while acting in a *quasi* judicial capacity, *from all the evidence he can* obtain, adjudging there to be due to the United States a certain sum (whether for acts of omission or commission, whether on ground of capacity, deficiency, or otherwise), and no rights accrue in favor of the Government—no lien attaches until such determination and assessment are actually made. [Sec. 3309.]

It cannot be presumed that congress meant to take the property of A. to satisfy a debt owing by B. The rights of innocent third parties have always been recognized by congress and protected by the courts; and whenever not successfully maintained, it will invariably be found to be, because it was not within the power of the offender or former owner to defeat the forfeiture by a *subsequent* transfer, even to a *bona fide* purchaser—because, in fact, he had no further title to convey.

> It is a rule of law, as well as of natural justice that statutes will not be understood to forfeit property, except for the fault of the owner or his agent, general or special, unless such construction is unavoidable.

The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person, employed or trusted by him.

Peisch vs. Ware, 4 Cranch, 347, (364.)

As Lowell, J., said in U.S. vs. 33 Bbls of Spirits, 1 Lowell's Decisions, 239:

> "Upon a literal interpretation the statute might seem to subject to seizure and forfeiture all goods and chattels and other things, coming within the very general description of personal property, *to whomsoever they may belong, if found in the same building*, including outbuildings, yards, &c., with the offending goods. *It is impossible to believe* that any such sweeping condemnation is intended to be passed, founded upon mere proximity *in place*, upon the goods of all persons, innocent or guilty."

And again, Dillon, J. in U. S. vs. 100 Barrels of Spirits. 2 Abb. U. S., 305, says:

> "The legislation of Congress shows a uniform policy to confine the forfeiture to the property of the guilty, at least not to extend it to innocent persons. We must suppose Congress in its legislation to have been regardful of the ordinary sense of justice, and not to have designed to make the innocent suffer for the acts of the guilty, and to visit the laches of officers of the revenue upon those guilty of no wrong, and no neglect. And our conclusion is still further strengthened, if we have regard to considerations of mere policy. Revenue is the sole purpose of all the complicated official machinery, pertaining to the manufacture of spirits. The duty levied is high; the temptation to fraud correspondingly great. Con-

gress will be presumed to have seen, *unless the contrary clearly appears*, that *revenue would be promoted by making it safe to buy manufactured spirits*, and would be injured by legislation of a contrary character. (Page 320.")

(The judgment in said case, it is true, was reversed in 14 Wall., 44, but nothing is there said to detract from the force and effect of the above remarks.)

These rules for the protection of purchasers in good faith, laid down in cases of forfeiture, apply with equal, if not greater, force to liens. Rights, which *as against innocent third parties* the Government in forfeiture cases cannot or will not assert, certainly *ought not to be infered from mere general language* in cases of assessment. There is no reason for any distinction, and consequently none ought to be made!

We cannot for a moment believe that the *mere fact, that a purchaser has*, for a time, *left his property in a bonded warehouse*, under charge of the Government officials, without insisting on immediate removal, *warrants its seizure and distraint for the debt and default of parties, with whom the purchaser has no privity*, either in law or fact.

It would involve a still greater hardship and injustice, than that alluded to in Henderson vs. U. S.—Neither statute, reason nor precedent will uphold such a ruling.

There is a manifest dearth of authority affecting the point under discussion. But we suppose it to arise from the fact that the proposition of the court below cannot be stated, without severely shocking a sense of justice, inherent in the very nature of man! It is the worst form of confiscation! The plaintiff's property is taken without process; it is condemed without proof; it is sold without warrant!

> It is a rule of law, as well as of natural justice that statutes will not be understood to forfeit property, except for the fault of the owner or his agent, general or special, unless such construction is unavoidable.

The owner of goods cannot forfeit them by an act done without his consent or connivance, or that of some person, employed or trusted by him.

Poisch vs. Ware, 4 Cranch, 347, (364.)

As Lowell, J., said in U.S. vs. 33 Bbls of Spirits, 1 Lowell's Decisions, 239:

> "Upon a literal interpretation the statute might seem to subject to seizure and forfeiture all goods and chattels and other things, coming within the very general description of personal property, *to whomsoever they may belong, if found in the same building*, including outbuildings, yards, &c., with the offending goods. *It is impossible to believe* that any such sweeping condemnation is intended to be passed, founded upon mere proximity *in place*, upon the goods of all persons, innocent or guilty."

And again, Dillon, J. in U. S. vs. 100 Barrels of Spirits. 2 Abb. U. S., 305, says:

> "The legislation of Congress shows a uniform policy to confine the forfeiture to the property of the guilty, at least not to extend it to innocent persons. We must suppose Congress in its legislation to have been regardful of the ordinary sense of justice, and not to have designed to make the innocent suffer for the acts of the guilty, and to visit the laches of officers of the revenue upon those guilty of no wrong, and no neglect. And our conclusion is still further strengthened, if we have regard to considerations of mere policy. Revenue is the sole purpose of all the complicated official machinery, pertaining to the manufacture of spirits. The duty levied is high; the temptation to fraud correspondingly great. Con-

gress will be presumed to have seen, *unless the contrary clearly appears*, that *revenue would be promoted by making it safe to buy manufactured spirits*, and would be injured by legislation of a contrary character. (Page 320.")

(The judgment in said case, it is true, was reversed in 14 Wall., 44, but nothing is there said to detract from the force and effect of the above remarks.)

These rules for the protection of purchasers in good faith, laid down in cases of forfeiture, apply with equal, if not greater, force to liens. Rights, which *as against innocent third parties* the Government in forfeiture cases cannot or will not assert, certainly *ought not to be infered from mere general language* in cases of assessment. There is no reason for any distinction, and consequently none ought to be made!

We cannot for a moment believe that the *mere fact, that a purchaser has*, for a time, *left his property in a bonded warehouse*, under charge of the Government officials, without insisting on immediate removal, *warrants its seizure and distraint for the debt and default of parties, with whom the purchaser has no privity*, either in law or fact.

It would involve a still greater hardship and injustice, than that alluded to in Henderson vs. U. S.—Neither statute, reason nor precedent will uphold such a ruling.

There is a manifest dearth of authority affecting the point under discussion. But we suppose it to arise from the fact that the proposition of the court below cannot be stated, without severely shocking a sense of justice, inherent in the very nature of man! It is the worst form of confiscation! The plaintiff's property is taken without process; it is condemed without proof; it is sold without warrant!

> This much, not even congress can constitutionally do. It is an inflexible principle of constitutional rights that no person can legally be divested of his property, without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim and be allowed to meet it on the law and the facts. He can only be reached through the forms of law, upon a regular hearing, unless he has *by contract* referred the matter to another mode of determination.

We are not aware that proceedings to collect the public revenue in this respect stand upon a peculiar or different footing. Quite the contrary: As to the tract of land, on which the distillery is situated, Congress has universally recognized the rights of third parties, and *only upon filing their written consent* to *subordinate their interests* to the claims of the Government, is permission granted to operate the distillery [Sec. 3262].

Such a consent can never be implied. No provision of this kind is anywhere to be found as to personal property, and we insist that the general words of Sec. 3309 must receive a limited construction, so as not to do violence to fundamental principles and natural justice.

Respectfully submitted:

F. W. COTZHAUSEN,

Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

F. W. HARTMAN
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ERROR TO UNITED STATES CIRCUIT COURT FOR WISCONSIN.

DEFENDANTS' BRIEF.

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DEFENDANTS' BRIEF.

STATEMENT.

TROVER. This case, by stipulation in writing between the parties, was submitted to the court upon the law and facts, without the intervention of a jury, and upon the trial the following facts appeared in evidence:

The plaintiff is and for a number of years last past has been a rectifier and wholesale dealer in wines and liquors, doing business in Milwaukee. In carrying on said business he has frequently bought high-wines in smaller and larger quantities, while still subject to tax and in bonded warehouses, as is the universal custom with dealers, withdrawing the same from time to time on payment of tax as fast as wanted.

On the 8th day of May, 1875, he bought in good faith and in the ordinary course of business from one Robert Kiewert, then and there a distiller, carrying on business under the firm-name of the Menomonee Distilling Company, at Milwaukee, the high-wines mentioned in the complaint, then at distillery warehouse No. 3, first district of Wisconsin, which said high-wines had been produced at said distillery and from thence removed to said bonded warehouse, and on which the taxes had not been paid, paying therefor $3,760.82, being 26 cents per proof-gallon, subject to tax. On the same day he caused notice in writing of said sale and purchase to be given to the collector at Milwaukee, which notice ever since has been and now is on file in said office.

Not being in pressing need of the high-wines so bought the plaintiff allowed them to remain in said bonded warehouse, the said warehouse constituting a part of the distillery premises where said high-wines were manufactured, without making any application or effort to remove or withdraw them, until the 14th day of June, 1875, when he caused the proper statements and certificates required by law to be made out, and the tax on said high-wines to be duly tendered to the collector, but leave to withdraw them was then and there refused, because, pursuant to the provisions of section 3309 of the Revised Statutes, on the 10th day of June, 1875, the Commissioner of Internal Revenue of the United States assessed upon and against the aforesaid Robert Kiewert and the said Menomonee Distilling Company the sum of $2,857.68 as tax upon 4,082.38 proof-gallons of distilled spirits distilled by the said Robert Kiewert at said distillery between the 6th day of January, 1875, and the 8th day of March, 1875; that thereafter, on the 15th day of June,

1875, George Q. Erskine, then and there collector of internal revenue for the first collection district of the State of Wisconsin, did give notice to said Robert Kiewert, being the person liable to pay said tax, by sending to him by mail a notice in writing stating in and by said notice the amount of such tax, and demanding payment thereof, and that said Robert Kiewert wholly neglected and refused to pay the same; that afterward, on the 3d day of July, A. D. 1875, the defendant, Irving M. Bean, then and there being collector of internal revenue for the first collection district of the State of Wisconsin, did issue his warrant in pursuance of the statute in such case made and provided, authorizing the defendant, F. W. Payne, then and there being deputy collector of internal revenue for the collection district aforesaid, to collect said tax and to levy upon the property and rights to property belonging to said Robert Kiewert, and on which a lien existed, for the payment of said tax, with interest and penalty, as provided by law.

That afterwards, on the 8th day of July, A. D. 1875, the said defendant, F. W. Payne, as deputy collector aforesaid, proceeded to levy and collect said tax by distress and sale, and did then and there levy and distrain, by the order and directions of the defendant, Irving M. Bean, upon the said one hundred and eighty-seven barrels of high-wines mentioned in said complaint, then being in the bonded warehouse of the Menomonee Distilling Company as aforesaid, and advertised the same for sale.

That while holding possession of said high-wines, by virtue of said warrant and levy as aforesaid, on the day preceding the sale, to wit, the 22d day of July, 1875, the plaintiff tendered to the collector the amount of the tax

due and owing on said high-wines, at the rate of ninety cents per proof-gallon, and demanded possession thereof from said defendants, and that said levy be released and the sale so advertised be discontinued and abandoned, but the defendants then and there refused to release said property, and the same, on the 23d day of July, 1875, by virtue of said warrant and distraint, was sold by them for the purpose of collecting the said tax so assessed as aforesaid, with interest and penalty, and the fees, costs, and expenses of such levy, to the highest bidder, and the proceeds of said sale were applied by them to the payment of said tax and assessment, interest, penalty, and fees as aforesaid. The market-price of high-wines in bonded warehouse at the time of such demand, refusal, and sale was 27 cents per proof-gallon, and the aggregate value of the property described in the complaint was sixteen thousand nine hundred twenty-four and $\frac{18}{100}$ dollars, inclusive of the tax.

And thereupon the court was of opinion that in point of law there was a lien on the said high-wines for the assessment so made by the Commissioner, and that this action could not be maintained, and that the assessment and sale under the warrant of distress as aforesaid were valid.

To which opinion of the court the plaintiff then and there excepted. (Record, 15, 16.)

BRIEF.

I.

The judgment complained of was for the defendants If, upon any ground, under the stipulated state of facts, that judgment was correct, the exceptions become immaterial.

The Commissioner of Internal Revenue regularly assessed a tax under Revised Statutes, section 3309, on the 10th day of June, 1875. Due notice being given, and proper preliminary proceedings had, the wines in suit were sold to pay that tax and charges. The section above mentioned provides that "all assessments made under this section shall be a lien on ALL distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and *any building thereon*, from the time such assessment is made until the same shall have been paid." (R. S., page 641, last clause of section 3309.)

By Revised Statutes, section 3188, "in case of such neglect or refusal the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, OR on which the said lien exists for payment of the sum due as aforesaid," &c.

The whole policy of the law and the express language of many sections makes the dues to the government a

lien upon property not belonging to the distiller. (Dobbins's Distillery, 96 U. S., 395.) The tax accrues and becomes a first lien upon the spirits so soon as they come into existence. It is such lien upon all the spirits produced so long as they remain upon the premises; not upon each gallon for so many cents merely, but upon the whole product so situated for the whole tax. (R. S., secs. 3251 and 3309.)

The warehouse is by law required to be part of the distillery premises. (R. S., sec. 3271.) The exceptions state that it was so in fact in the present case. (Record, 15, folio 35.) *All* assessments are specifically made a lien "on *all* distilled spirits on the distillery premises." (Sec. 3309.) The spirits were so situated.

The sale of the liquors was subject to whatever governmental claims existed against them. There had been no delivery. The government's lien, whatever it was, would not be discharged until there was an authorized, lawful delivery.

EDWIN B. SMITH,
Assistant Attorney-General.